Date: July 22, 1997

Case No.: 95-INA-639

In the Matter of:

VERONICA KOZIOL,
Employer

On Behalf Of:

KRYSTYNA SZWAKOPF,
Alien

Appearance: Paul W. Janaszek, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On May 3, 1994, Veronica Koziol ("Employer") filed an application for labor certification to enable Krystyna Szwakopf ("Alien") to fill the position of Cook Kosher (AF 4-5). The job duties for the position are:

> Prepare, season and cook soups, meats, vegetables according to the Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls, Decorate dishes according to the nature of celebration. Purchase foodstuff and accounts for the expenses incurred.

The requirements for the position are eight years of grade school and two years of experience in the job offered.

The CO issued a Notice of Findings on March 2, 1995 (AF 34-37). The CO proposed to deny labor certification because the job offered does not constitute permanent, full-time employment. Accordingly, the Employer was notified that it had until April 6, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated March 31, 1995 (AF 38-59), the Employer stated that she is an 81-year-old widow who is in poor health. She explained that the Alien would be required to cook one breakfast, one lunch, one dinner, and two snacks per day. Furthermore, the Alien would be required to purchase the foodstuffs, prepare the menu, and clean the kitchen. As such, the Employer argued that the job opportunity constitutes permanent, full-time employment. Finally, the Employer stated that her cousin previously performed the cooking duties; however, she is no longer able to perform such duties as she is moving to be with her ill father.

The CO issued the Final Determination on May 15, 1995 (AF 60-62), denying certification because the Employer failed to establish that the job opportunity constitutes permanent, full-time employment.

On June 6, 1995, the Employer requested review of the Denial of Labor Certification (AF 63-81). On August 25, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Discussion

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply specific information regarding the job opportunity (AF 34-36).[2] Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly and the length of time required to prepare the meals and the number of people for which the meals are prepared; (2) the frequency of household entertaining in the 12 calendar month period immediately preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parents, the school schedules of the children, how the children are cared for during the Alien's scheduled time off; (5) who will perform the general household maintenance duties, such as cleaning, clothes washing, vacuuming, etc., and, (6) evidence that the Employer has employed a full-time cook in the past.

In rebuttal, the Employer asserted that she is an 81-year-old widow who lives alone and, because she is in poor health, she lacks the physical strength to do her own cooking (AF 54). The Employer submitted a statement from her physician explaining that she suffers from hypertension and osteoarthritis and is in need of a long-term cook (AF 47). The Employer further stated that her cousin previously performed all the cooking duties; however, she can no longer perform these duties because her father is ill and she is moving. The rebuttal includes a letter from the Employer's cousin stating that she has been cooking for the Employer for several years (AF 48).

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[2] We note that the CO, in the NOF, stated that the position does not constitute full-time employment and, as such, the Employer was instructed that she could either amend the job duties or establish the business necessity of the job opportunity under § 656.21(b)(2)(i) (AF 36). We find that the CO erred in stating that the Employer is required to establish the business necessity of the job opportunity itself. To the contrary, employers are only required to establish the business necessity of job requirements which are deemed unduly restrictive. This is not the case here as the CO in this case is challenging the Employer's contention that the job opportunity represents permanent, full-time employment. Although the CO erred by using incorrect terminology, we find that the error was harmless. The Employer was still properly instructed how it could successfully rebut the CO's finding that the job does not constitute full-time employment. Based upon the Employer's response, we find that the Employer had adequate notice of the deficiencies in her application.

The Employer also submitted a weekly schedule that the Alien would be required to follow (AF 51-53). Specifically, the Alien would be required to prepare and serve one breakfast, one lunch, one dinner, and two snacks per day. In addition, the Alien would be required to clean the kitchen, purchase the foodstuffs, and prepare the menu. Finally, the Employer stated that her niece performs the cleaning and maintenance duties (AF 50).

In the Final Determination, the CO found that the Employer failed to document that the job offered constitutes permanent, full-time employment (AF 61). Specifically, the CO questioned the time which the Employer allotted for certain duties that the Cook will be required to perform. In addition, the CO found that the Employer's statement that she is a senior citizen with health problems is insufficient to establish the need for a full-time cook.[3] Moreover, the CO found that the statement from the Employer's physician was insufficient because it failed to specify if the Employer has any restraints on her everyday living functions.

As indicated, the issue here is whether or not the CO's conclusion, that full-time employment is not being offered, is a reasonable inference from these facts. The Employer has indicated the conditions of employment on the Application for Alien Employment Certification form ETA 750, under penalty of perjury pursuant to 28 U.S.C. § 1746 (see 20 C.F.R. § 656.20(c)(9). These conditions of employment state that 40 hours of employment are being offered per week at a wage of $12.81 per hour. There is no evidence in the record to the contrary. Essentially, the dispute comes down to the Employer's assertion that completion of a cooking-related duty takes a certain amount of time, while the CO disagrees and says that the duty in question takes a lesser amount of time. The CO's conclusion that, in fact, the duties described could not constitute 40 hours of work, are speculative at best. Furthermore, we find that the Employer's statement from her physician, although it does not detail the restraints on her everyday life, supports her contention that she is in need of a full-time cook. In fact, the note specifically states, "She [the Employer] is in need of a long-term household cook." (AF 47).

Therefore, we find that the CO's conclusion, that full-time employment is not being offered, is not supported by sufficient evidence.

However, we are also concerned that this job opportunity contains a requirement for two years of specialized cooking experience which could be considered to be unduly restrictive. The job requirements include two years of experience in the job duties of Kosher cooking. The practical effect of this requirement is to eliminate any U.S. applicant with two years of cooking experience, but no experience in Kosher cooking. Therefore, this matter will be remanded with instructions to the CO to consider whether the Employer's requirement of two years of experience in cooking Kosher foods is unduly restrictive, thus requiring a showing of business necessity in accordance with 20 C.F.R. § 656.21(b)(2)(i)(B), which provides that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States as defined in the *Dictionary of Occupational Titles* (DOT). On Remand, the CO is also permitted to develop additional evidence if it is believed that full-time employment is not being offered.

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[3] As noted above, the CO incorrectly utilized the "business necessity" terminology (AF 61).

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further action in accordance with this decision.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.